

**ADAMS CONSTRUCTION  
COMPANY, INC.**

**VABCA-4669**

**CONTRACT NO. V534C-310**

**VA MEDICAL CENTER  
CHARLESTON, SOUTH CAROLINA**

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**OPINION BY ADMINISTRATIVE JUDGE KREMPASKY**

Appellant, Adams Construction Company, Inc. ("Appellant" or "ACC") has appealed the VA's default termination of Contract No. V534C-310 ("Contract"), Refurbish Ambulatory Care, Ralph H. Johnson Department of Veterans Affairs Medical Center, Charleston, South Carolina ("VAMC Charleston"). ACC disputes that it failed to prosecute the Contract work with sufficient diligence to permit completion by the Contract completion date.

The Record before the Board consists of the Pleadings; the Appeal File (cited as "R4, tab \_\_") consisting of 61 exhibits; 26 exhibits introduced into evidence at the hearing by Appellant (cited as "Exh. A-\_\_"); 33 exhibits introduced into evidence at the hearing by the VA (cited as "Exh. G-\_\_"); 3 joint exhibits introduced into evidence at hearing (cited as "Exh. J-\_\_"); and, the two volume transcript of the hearing, held in Charleston, South Carolina, in this matter (cited as "Tr. [vol. I or II]:\_\_"). The parties have submitted *seriatim* posthearing briefs in this matter. Only the propriety of the termination for default is before the Board.

**FINDINGS OF FACT**

Based on Invitation for Bids ("IFB") No. 534-26-94, "Refurbish Ambulatory Care", issued by the VA on July 21, 1994, the Contract was awarded to ACC, the sole bidder responding, on September 19, 1994 in the amount of \$653,500. ACC received the Notice to Proceed ("NTP") on November 14, 1994; the NTP indicated that work was to start on November 15, 1994. Under its terms, the Contract completion date was May 15, 1995.

(Exh. J-1)

The Contract includes the standard Federal Acquisition Regulation ("FAR"), 48 C.F.R. Chapter 1, and Department of Veterans Affairs Acquisition Regulation ("VAAR"), 48 C.F.R. Chapter 8, clauses usually found in VA construction contracts, including the following clauses relevant to this appeal:

COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK, FAR 52.212-3 (APR 1984)

CHANGES, FAR 52.243-4 (AUG 1987)

CHANGES -- SUPPLEMENT, VAAR 852.236-88(a) (JUN 1987)

CHANGES -- SUPPLEMENT, VAAR 852.236-88(b) (JUN 1987)

DEFAULT (FIXED-PRICE CONSTRUCTION) FAR 52.249-10 (APR 1984)

DISPUTES (ALTERNATE I), FAR 52.233-1 (APR 1984)

INSPECTION OF CONSTRUCTION FAR 52.246-12 (JUL 1986)

INSPECTION OF CONSTRUCTION VAAR 852.236-74 (APR 1984)

SCHEDULES FOR CONSTRUCTION CONTRACTS, FAR 52.236-15 (APR 1984)

SCHEDULE OF WORK PROGRESS VAAR 852.236-84 (NOV 1984)

SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION VAAR 852.236-71 (APR 1984)

SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION FAR 52.236-21 (APR 1984)

SUSPENSION OF WORK, FAR 52.212-12 (APR 1984)

SUPERINTENDENCE BY THE CONTRACTOR, FAR 52.236-6 (APR 1984) (R4, tab 49)

The Contract contained no provision for liquidated damages.

The intent of the Contract work was to improve ambulatory care at VAMC Charleston by renovating the main entrance, main lobby and hallways adjacent to the main lobby. Included in the work was the temporary relocation of several hospital activities, the moving of the mail room and prosthetics area on the first floor, and the relocation of the transcription unit from one floor to the other. The Contract required work in six "zones" (1, 2, 5-8) with phasing instructions for prosecuting the work in the "zones." The zones within the Contract scope are not consecutively numbered because, as awarded, the Contract was the smallest scoped alternative provided in the IFB. Zones 1 and 2 were the main lobby; Zone 1 was also known as "Lobby Phase A" and Zone 2 was also known as "Lobby Phase B." The Contract required that the work in the front lobby be done in two phases in order to maintain continuous access to the hospital through the main lobby. Lobby Zone 1 had to be completed before ACC could begin Lobby Zone 2. Zone 5 was the new Transcription Room; Zone 5 had to be completed before Zone 6 work (moving

the old transcription room to the new and renovating the old room) could begin and work in Zone 7 proceeded after completion of Zone 6. The work in the final Zone (Zone 8) was relatively minor work in one room which involved moving of furniture, painting and carpeting; Zone 8 work was independent of all other Contract work. Work in Zones 5, 6, and 7 could be accomplished under the Contract concurrently with the Zones 1 and 2 work. The Contract specified that no function of VAMC Charleston was to be suspended for any length of time during construction. (R4, tabs 49-50; Tr. II: 291-92)

The plans, specifications, and Government estimate for the Contract were prepared by an architect-engineer firm ("A/E") under contract with the VA, Thomas & Denziger Architects, and listed a total base bid (Bid Item # 1) estimate of \$793,000. The solicitation contained 4 bid items; Bid Items ## 2, 3, and 4 were alternate bid items with progressively reduced scopes of work with a concomitant reduction in the estimated prices and completion times. The estimated price for Bid Item # 4 (the bid item awarded) was \$513,000 and the completion time was 180 days. (R4, tab 49; Exh. J-1).

The 180 day completion time specified in the IFB for Bid Item #4 was established by Mr. William Kay, the Contracting Officer's technical representative ("COTR") for the Contract. Mr. Kay arrived at the 180 day completion time based on his informal assessment (his experience and discussions within the VAMC Charleston engineering office) of the time needed to complete the work involved in the Contract balanced against the desire to limit the disruption and inconvenience to VAMC Charleston. Mr. Kay did not prepare any formal schedule analysis but he characterized the schedule as an "aggressive" one requiring close coordination between the Contractor and VAMC on scheduling shutdowns and other matters. The 180 day completion time was provided to the A/E for its use in preparing the project phasing requirements and Government estimate. (Tr. I: 33-40, 133-34)

As part of establishing the performance time, Mr. Kay anticipated that, in order to meet the Contract completion date, a contractor would both have to schedule significant routine weekend and overtime work and utilize a larger than normal work force. The Contracting Officer ("CO") understood, at the time the Contract was awarded, that the completion time could be achieved only with overtime and weekend work. (Exh. J-1; Tr. I: 33-40, 137, 213-15)

Neither the IFB nor the Contract contained any information that routine weekend and overtime work would be required to meet the completion time. There was no general pre-bid meeting at the site and no prospective bidder (including ACC) inquired about the 180 day completion time and the need for weekend and overtime work prior to bid. (R4, tab 49; Tr. I 188-89)

ACC's bid prices for each of the four bid items were substantially in excess of the Government estimate. ACC's bid of \$653,500 for Bid Item # 4 was \$140,500 in excess of the estimate of \$513,000. In asking VA headquarters for permission to award the Contract, VAMC Charleston represented that the price reflected the unfavorable bidding climate in the Southeast due to several large construction projects ongoing in the region, and that the price bid by ACC was acceptable in light of this bidding climate and the compressed construction schedule. The CO did not conduct a pre-award survey prior

awarding the Contract because ACC was deemed a responsible contractor based on its satisfactory completion of six previous contracts with VAMC Charleston.

(Exh. J-1; R4, tab 4; Tr. I: 46-47)

The initial CO for this Contract was Ms. Mary Whittaker; however, shortly after the beginning of work, Ms. Mary Alderson, the Chief of Acquisition and Contracting at VAMC Charleston and Ms. Whittaker's supervisor, began acting as the CO for this Contract as well. Both Ms. Whittaker and Ms. Alderson are warranted contracting officers and they simultaneously acted in that capacity on the Contract. Thus, references to actions by the CO refer to actions taken by either Ms. Whittaker or Ms. Alderson. Ms. Whittaker did not testify at the hearing. (Exh. J-1; Tr. I: 191)

The Preconstruction Conference was conducted on October 18, 1994. At the Preconstruction Conference, Mr. James Adams, Jr., Chief Executive Officer of ACC, expressed concern about the shortness of the completion time of the Contract. The Preconstruction Conference checklist, a VA form completed by the CO contains the following handwritten note:

Contractor questioned time to complete project. Was instructed to identify any problems and put into writing to C.O.

Preconstruction Conference notes prepared by ACC, in regard to the inquiry by Mr. Adams, Jr. state:

We brought up our concern that the project time allocated for the project was not going to be adequate to meet the requirements of the construction to be performed. We referenced procurement of block, lead time for the revolving doors submittal and fabrication. Linda Alderson says that we should not worry about that now, we will worry about that later.

Mr. Crawley, Adam's Project Manager, who also attended the Preconstruction Conference, testified that Ms. Alderson responded to the inquiry on completion time as it is represented in ACC's notes. (R4, tab 7; Exh. A-14; Exh. J-1; Tr. II: 82, 291)

The issue of ACC being permitted to work regular overtime and to work weekends arose several times during the course of ACC's performance. In addition, ACC informally sought relief from the lobby phasing requirements. ACC never made any formal demand to be permitted routine overtime and weekend work nor did it formally request relaxation of the lobby phasing constraints. However, throughout the performance of the Contract, the VA made it clear to ACC that the VAMC Charleston policy of not allowing routine weekend and overtime work, with which ACC was familiar from its previous 6 contracts at VAMC Charleston, would continue and that routine weekend and overtime work would not be permitted on the project. In fact, approval for ACC to work on a weekend was given only three times during the course of ACC's performance of the Contract. In their internal communications, the VA project personnel made it clear that they had no intention of permitting regular weekend or overtime work and ACC was not permitted to include regular weekend and overtime work in any of the schedules submitted under the Contract. In addition, whenever ACC referred to the constraints on working weekends

and overtime or phasing were brought up by ACC, the VA dismissed any possibility of change. (R4, tabs 29, 36; Exhs. A-26, G-33; Tr. I: 40-43, 140-43; Tr. II: 81-82, 136, 189-90)

ACC's bid and preliminary planning for the project was prepared by an ACC employee whose employment was terminated for cause by ACC in early November 1994. In late November, Mr. Adams, Jr. acknowledged to the VA that the dismissal of the employee had required that he "replan" the project causing ACC to lose time in preparing submittals and other preliminary work. Mr. Adams, Jr.'s inquiry about the completion time at the Preconstruction Conference resulted from his evaluation of the project, undertaken upon the dismissal of the individual who prepared the bid and who was also to be ACC's Project Manager. As a result of his evaluation, Mr. Adams, Jr. realized that, in order to make the completion schedule, weekend and overtime work was going to be required and that ACC had not included the cost of such work in its bid. (R4, tab 9; Exh. J-1; Tr. II: 79-80, 87)

Issuance of the Notice to Proceed was deferred from the Preconstruction Conference to November 15, 1994 in order to permit the VA to relocate activities, to ready itself for the beginning of the work, and to allow for VAMC Charleston to conduct its Veterans Day activities without the disruption that would be occasioned by the Contract work. Although the VA requested that ACC accept the Notice to Proceed at the Preconstruction Conference, since it was clear site work would not be permitted until after the Veterans Day holiday, Mr. Adams, Jr. indicated that he would not execute the Notice to Proceed at that time. (R4, tabs 7, 10; Tr. II: 82-84)

Another issue that arose at the Preconstruction Conference was ACC's removal of several colored, split-face concrete masonry units (CMU) in the lobby for the purposes of seeking a source for matching blocks. ACC was told that it could take the samples but was instructed to wait until the COTR, Mr. Kay, confirmed the removal with VAMC Charleston. Mr. Kay responded to ACC approving the removal, which response ACC confirmed on October 24, 1994. However, ACC was subsequently instructed by the CO not to take the CMU until after Veterans Day since the sample removal would deface the lobby area. ACC removed the sample on November 15, the day it mobilized at the site. (Tr. I: 146; Tr. II: 82-84, 294-95; R4, tab 7)

Confirming a December 9, 1994, conversation between Mr. Adams, Jr. and Ms. Alderson concerning Mr. Adams, Jr.'s concern about the 180 day completion time, Ms. Whittaker wrote to ACC requesting that ACC respond in writing concerning the areas that put the May 15, 1995 completion date in jeopardy. ACC responded with a December 14, 1994 letter stating that the concern about meeting the completion time was a result of the difficulty of matching the existing CMU and the delivery time for the CMU once a matching block had been found. Mr. Kay evaluated ACC's December 14 letter and advised the CO on December 19 that, while CMU procurement was "critical" a time extension was not warranted. Mr. Kay expressed his view that the CMU problem stemmed from ACC's failure to take the samples in October after it had been given permission to do so; Mr. Kay was apparently unaware of the CO's later instruction regarding CMU removal. The CO responded to ACC's letter on January 6, 1995, pointing out that the sample CMU submitted on December 30 was approved by the VA on January 3. Based on her contact with the approved supplier, the CO questioned why ACC

had failed to place an order for the CMU and indicated that, in her view, no additional time was warranted due to the CMU since ACC's schedule showed CMU related work being performed in mid-March, well within the supplier's delivery time. (R4, tabs 12, 15-16, 20)

At approximately the same time as the Notice to Proceed, ACC was directed to not pursue the transcription room work because VAMC Charleston was undecided as to the transcription room location (Zone 5 work). The transcription room location issue, which also affected Adam's ability to prosecute the work in Zones 6 and 7, was not resolved until February 2, 1995. Pursuant to the approved project schedule, ACC planned to begin Zone 5 work the second week of February 1995. Under the Contract phasing requirements, the work in Zones 5, 6, and 7 could be performed concurrently with the lobby work and constituted from 10-25% of the total Contract work. ACC could only perform limited work relating to Zones 5, 6 and 7 since Zone 5 had to be completed prior to the Zone 6 and 7 work. The Zone 5, 6, and 7 work was planned to take 111 days. (R4, tab 18; Exhs. A-5, A-17; Tr. I: 151-53; Tr. II: 119-21, 257-61, 317-18)

ACC began its performance at the site on November 15, 1994; the initial work performed was demolition which continued through December 19, 1994. From December 21 through January 24, 1995, a period encompassing 24 work days, ACC performed significant work at the site on 7 days. Of the 17 days in which no work was performed, 5 days resulted from ACC deciding whether it, or its terrazzo subcontractor would pour the concrete subbase for the terrazzo, 5 days resulted from the weather being too cold to pour the concrete, 5 days resulted from the requirement to allow the concrete poured as a base for terrazzo in Zone 1 to cure, and two days resulted from ACC diverting its crew to other jobs. (R4, tab 58; Exh. A-13, Tr. II: 295-97)

Upon ACC's completion of demolition, Mr. Kay, internally within VA began expressing concern about the job progress. On December 28 and January 3, 13, and 24, 1995, Mr. Kay, by electronic messages ("e-mail") informed the CO that ACC was absent from the site and had accomplished no significant work between the completion of demolition on December 19 and January 24, except for January 3 when ACC had reappeared on site. The January 13 e-mail engendered an e-mail conversation between Ms. Whittaker, Ms. Alderson, and Mr. Robert Snow, Ms. Alderson's superior at VAMC Charleston, concerning Mr. Kay's observations about the VA's slow response to submittals. On January 26, 1995, Mr. Kay, again by e-mail, reported on ACC's progress stating in pertinent part:

1. The status of completion as of today follows. These calculations are based on the value of work installed. The status of the various phases are based on my personal valuations and not on any binding contract documents. My estimate of the value of work installed is:

Total Job: 12.93% Complete

Lobby Part A: 20.84% Complete

2. Based on a NTP of Nov. 15, 94, a completion day of May 14, 94, a contract time of 180 days, the contractors scheduled Lobby Part A time of 109 days, and today's date:

A. 72 Days or 40% of the total contract time has elapsed.

B. 72 Days or 66% of Lobby Part A time has elapsed.

3. The calculations used to derive the above are available if needed. There are many variables used to derive these figures. They are open to dispute and should be used with care.

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10. There are many variables in these evaluations. They should be used with care and reviewed in detail prior to contractual use. However, at this time it appears impossible for the contractor to complete the work in the time allowed. I recommend Contracting consider this and take appropriate action. Questions may be addressed to me at Ext. 7360.

This e-mail is captioned "Job Report 1" and was Mr. Kay's efforts to "formalize" communications to the CO. (R4, tabs 19, 21, 22, 53; Exh. J-1; Tr. I: 88)

On January 26, 1995, Ms. Alderson, signing as the CO, issued a "SHOW CAUSE" letter to ACC. Reciting that Ms. Whittaker's January 6 letter had placed ACC on notice of the VA's concern about the slow progress in the work, the fact that 40% of the Contract time had passed with completion of only 10% of the work, and the fact that ACC's work force at the site was inadequate, the letter notified ACC that the Government was considering terminating the Contract for default and ordered ACC to show cause why the Contract should not be defaulted pursuant to the Contract DEFAULT clause. ACC was directed to provide, within ten days, a written plan showing how it intended to complete the Contract by May 15, 1996. In her January 6 letter, Ms. Whittaker had stated:

Over the last two weeks it has come to my attention that there has been very little progress on this project. I am in hopes that this was due to the holidays and that next week, January 9, your firm will diligently continue working on this project everyday. This is a very high profile project and cannot be delayed.

A copy of the SHOW CAUSE letter was also forwarded to the issuer of ACC's performance bond. (R4, tabs 20, 23)

Mr. Adams, Jr. was surprised when he received the SHOW CAUSE letter because no one in the VA had previously indicated to him that the VA had any serious concern with the progress of the job. Shortly after receipt of the letter, Mr. Adams, Jr. informally queried Ms. Whittaker about the letter. Ms. Whittaker represented that the Assistant Director of VAMC Charleston was pressuring the contracting office and that the problem would go away in three weeks; Ms. Whittaker's representations were confirmed shortly thereafter by both Ms. Alderson and Mr. Kay. (Tr. II: 92-94, 148-49, 330-32)

ACC responded to the SHOW CAUSE letter on February 7, 1995. In its response ACC stated:

In response to your above referenced letter, we can show no cause why the Government should bring forth a default action against our contract.

We are now and have been working diligently on this project since the date of our notice to proceed. Upon our completion of demolition and installation of the concrete base for terrazzo we had a required float period of seven days that we reduced our forces at the Lobby Area due to the curing of our concrete base. We would have liked to have utilized this float time by moving our forces laterally [sic] into Zone 5 of our project but at that time Zone 5 had not been made available to us. This would have enhanced our percentage of work completed.

We had a problem with our scheduled metal stud and gypsum subcontractor showing up which caused us a ten day delay with the start of this item. In an effort to keep on schedule we have begun this section of work with our own forces and have accelerated our production which has made up for the delay encountered.

Our labor forces placed on this project are not static and will increase and decrease with the production requirements we have at hand.

At this point in time our plan is to maintain your schedule by all means within our control. As per our telephone conversation of this morning we are encountering unforeseen conditions which could interfere with our production. I can not stress strongly enough that our aim is to expedite any problems within our control that arise during construction and maintain your schedule.

Enclosed please find a copy of our updated construction schedule

As it had done in the past, ACC informally asked to be relieved of some of the phasing constraints as a means of expediting the work. In particular, ACC wanted to be able to work on Lobby Phases A and B simultaneously in order to perform all the terrazzo work in the lobby at once. Doing the terrazzo work all at once would permit completion of the terrazzo, on which most of the rest of the lobby work depended, in one half of the 138 days planned for terrazzo completion under the phasing requirements. The VA reiterated that ACC must continue to adhere to the Contract phasing requirements. A revised project schedule was included with ACC's response to the SHOW CAUSE Letter. The schedule reflected some of the actual dates of work that had been completed or was ongoing. It also revised some of the start/finish dates for various project elements. However, the end date for completion of Contract work and phasing requirements remained unchanged. (R4, tab 24; Exhs. A-17, J-1; Tr. I: 98-104, 109-110, 145-47; Tr. II: 40, 135, 137, 239, 292)

On February 1, 1995, Mr. Kay submitted his electronic Job Report 2 to the CO. This message discussed several construction issues that had arisen since his report on January 26; however, Mr. Kay indicated that no CO action was required since none of the issues was significant. On February 8, Mr. Kay reported to the CO the A/E's and his "concerns about the contractor's ability to accomplish this work." Specifically, Mr. Kay cited the rejection of ACC's submittal for the patient call system, Adam's construction of steel arches, ACC's incorrect lay-out of the stud system and the manner in which the CMU wall had been constructed as the issues underlying Mr. Kay's and the A/E's concerns. Mr. Kay also stated:

I recommend that you meet with the A/E to discuss these issues and to be advised on



them prior to any decision on your part concerning the contractor's termination.  
(R4, tabs 25, 54)

The CO conducted a conference between ACC's surety, the A/E and the VAMC Charleston engineering office on February 9, 1995 to discuss the Show Cause letter. At this meeting the A/E expressed his concerns that ACC did not properly understand the job and complained about submittals in general terms. The result of this meeting was a decision to meet with ACC and discuss the concerns in the context of the proposed changes (SA #1) for which the VA had solicited proposals. Mr. Kay referencing this meeting, on February 13, 1995, inquired of the CO whether the meeting with ACC was going to occur and cautioning the CO that the VA may want to suspend work if ACC was to be defaulted to limit any potential liability to ACC. (R4, tabs 26, 27)

On February 11, 1995, Mr. Kay forwarded a memorandum to the CO entitled "Project Summary at 50% of Contract Time" in which Mr. Kay expressed his view that ACC was not likely to complete in timely fashion primarily due ACC's deficiencies in managing the project. Mr. Kay outlined several favorable aspects of ACC's performance and noted the Transcription Room location and firewalls as potential VA caused delays. (Exh. A-22)

On February 14, 1995, Mr. Adams, Jr. and Mr. Crawley met at the VA's request to discuss the show cause notice. The VA representatives at this meeting, chaired by the CO (Ms. Alderson), were Mr. Kay, Ms. Whittaker, Mr. Snow (the senior contracting official at VAMC Charleston), and Mr. Denzinger (the VA's A/E representative). A representative of ACC's surety, Aetna Surety and Casualty Co., also attended via telephone. Ms. Alderson stated that the purpose of the meeting was to decide whether or not ACC was to be terminated for default. Expressing its displeasure with what it felt to be ACC's lack of responsiveness to the January 26 SHOW CAUSE letter, the VA iterated its concerns with regard to the schedule for progress of the work and the quality of ACC's work. Several areas of project administration were discussed at this meeting, including ACC's slowness in making submittals and the VA's slow submittal response. ACC inquired whether it could combine the Lobby A and B phases to speed up the work and was informed that the phasing had to be as stated in the Contract. In what the CO characterized as negotiations, the CO (Ms. Alderson) indicated that the VA would need consideration in order to extend the schedule. These "negotiations" are reflected in the following extracts from Ms. Alderson's notes of the meeting:

If we don't default, we want so